BRIEF IN SUPPORT OF PETITION

I

The Opinions of the Courts Below.

No opinion was rendered by the District Court.

The opinion of the Circuit Court of Appeals for the Second Circuit (Charles E. Clark, C. J.) is to be found at pages 194-198 of the Record, and it has not been officially reported.

II

Statement of the Case.

A statement of the facts has been given in the accompanying petition under the heading "Summary Statement of the Matter Involved",* and in the interest of brevity that statement is not repeated at this point.

III

Specifications of Errors.

The ways that the Circuit Court fell into error are noted in the petition under the heading "Reasons Relied On for the Allowance of the Writ", and in the further interest of brevity they are not here repeated in another form.†

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* Pages 3-6, supra.

† Pages 7-10, supra.

IV

Argument.

Summary of Argument

Point A. To instruct the jury from a repealed law which charges the petitioner with a crime not within the framework of the pleadings, nor encompassed by the indictment or evidence, did not, as the Court held, influence the jury in favor of petitioner, nor was it harmless, but is prejudicial error that tended to lead to petitioner's conviction.

Point B. The Court's erroneous charge from an inapplicable and repealed statute was in effect an amendment of the indictment in violation of the Fifth Amendment to the United States Constitution.

Point C. 1. The Circuit Court erred in holding that mere possession of lawful material could be introduced to show the background from which petitioner's knowledge and willfulness might better be judged.

2. The Circuit Court erred in holding that prejudicial matter was properly introduced to prove an issue which did not exist in the case.

3. The Circuit Court erred in disregarding the prejudicial effect of certain exhibits which were conceded by respondent to have been of no significance in the case. It erred in holding that these exhibits were lawfully seized.

Point D. The Circuit Court erred in upholding the conviction although it was based upon an identification resting wholly upon concurrence of names, which, under general criminal law, is wholly inadequate for purposes of identification.

POINT A

Charging the jury from a statute no longer in effect to the prejudice of petitioner is reversible error.

The Court charged (fols. 414, 415):

> "Members of the Jury, the law under which this defendant has been indicted has to do with concealment from the United States of material information, for a fraudulent purpose. I will read you part of the statute so that it will be clear in your minds, and I am reading from Title 18 of the United States Code, Section 80, as follows:
>
> 'Whoever, for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States or any department thereof, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme or device a material fact, or make or cause to be made any false or fraudulent statements or representations * * *' shall be guilty of the crime described in the statute.
>
> That is the nature of this case."

This language is taken from Section 35 of the Criminal Code (Sec. 80 of Title 18, United States Code), c. 194, 40 Stat. 1015, 1016, prior to amendments of June 18, 1934; c. 587, 48 Stat. 996, and April 4, 1938, c. 69, 52 Stat. 197.

Under the statute prior to the amendments this Court held that Section 35, which used the word "defrauding" in connection with "cheating and swindling" should be be construed "as relating to the fraudulent causing of pecuniary or property loss" to the Government.

The words "cheating and swindling" are words of limitation which made the provision applicable *only* to cases where pecuniary or property loss to the Government had been caused.

See: *U. S.* v. *Gilliland*, 312 U. S. 86, 92, 61 S. Ct. 518 (1941), citing *U. S.* v. *Cohn*, 270 U. S. 339, 346, 347; 78th

Cong. Rec. (73d Cong., 2d Session), Part 10, pp. 11270, 11271; Part 11, p. 11513.

The Court's charge contains limiting language nowhere to be found in Section 35 of the Criminal Code after the Act of June 18, 1934, 48 Stat. 996, and, therefore, the charge was an incorrect statement of the law, and the charge did not state the nature of the case.

Thus the petitioner stands convicted under a penal statute which is no longer in effect. The statute as it has been construed by this Court, applies only to cases where pecuniary or property loss results to the Government and it is apparent that the crime with which the petitioner is charged in the indictment does not involve pecuniary or property loss to the Government due to willful concealment by some trick, etc., of a material fact.

A conviction under a statute no longer in effect, and for a crime not charged in the indictment, is a dangerous precedent.

The charge was not responsive to the matter under consideration, for it was inapplicable to the evidence. The jury was instructed to matters upon which they were not required to pass, for the charge presented to them issues not involved.

The petitioner was entitled to have the jury correctly apprised of the charge against him and this was not done.

As the Court in *Williams* v. *U. S.*, 131 F. (2d) 21, 23, 76 U. S. App. D. C. 299, observed:

> "It is * * * important to a defendant to have a jury instructed on the law applicable to his particular case by the judge * * *. But, of what value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment? Just as a lawyer might be ignorant in a meeting of scientists, so may a juror be in his casual acquaintance with the law. The jury, a group of responsible citizens, is entitled to this legal instruction if it must accept the duty of passing upon the very life and death of a man. The law requires it."

It is evident that the error here urged is so serious and substantial as to produce a miscarriage of justice, and this is so though no objection and exception was taken to the erroneous charge.

This Court has held that where serious injury may result, it is the duty of an appellate court to notice and correct errors—especially when embodied in the charge to the jury—even though they were not challenged during the trial (*U. S.* v. *Atkinson*, 297 U. S. 157, 160; *Brasfield* v. *U. S.*, 272 U. S. 448, 450; *U. S.* v. *River Rouge Co.*, 269 U. S. 411). This is particularly so when the case comes up from a lower federal court (see *Clyatt* v. *U. S.*, 197 U. S. 207, 221-222; *Wiborg* v. *U. S.*, 163 U. S. 632, 658-660).

An erroneous statement of the law in instructions to the jury is presumptively prejudicial, in criminal cases as well as civil cases (*Filippon* v. *Albion Slate Co.*, 250 U. S. 76, 82; *U. S.* v. *River Rouge Co.*, 269 U. S. 411, 421).

The use of the words to the jury of "cheating", "swindling" and "defrauding" must have conveyed to them a more ominous charge, that is to say, that the petitioner's actions also included the cheating and swindling and defrauding of the Government. Who can say what effect these additional criminal charges had on the jury? How then is it possible for the Circuit Court to say that the erroneous charge was favorable to petitioner or clearly harmless?

Dombroski v. *State*, 192 Ark. 263, 90 S. W. (2d) 973, shows what a court must do when confronted with the issue of an instruction in a criminal case based on a former statute which has been materially changed.

The Circuit Court cites *Douchan* v. *United States*, 6 Cir., 136 F. (2d) 144, cert. d. 319 U. S. 773. In this case the language of the amended statute did not differ substantially (i.e., in meaning) from that of the former statute, and the acts charged against the defendant were indictable under either statute, whereas in the case presented for review, first, the language of the repealed statute differed ma-

terially and substantially from the statute in effect at time the act charged against petitioner was performed; second, the act charged against petitioner was not indictable even under the former and incorrect statute read to the jury in the Court's instruction.

The other two cases cited by the Circuit Court, namely, *United States* v. *J. Greenbaum & Sons*, 2 Cir., 123 F. (2d) 770; *Burns* v. *United States*, 274 U. S. 328, 331, 332, have no application and shed no light upon the problem.

It seems almost self-evident that the error complained of is grievous enough to necessitate a reversal of the conviction herein. Both on the basis of natural reason and juridical reasoning, it seems just plainly wrong to uphold a conviction on an instruction taken from a non-existent statute quoting language, the meaning of which is foreign to the evidence. In sustaining such a conviction the Circuit Court of Appeals failed to require in the trial of a criminal case the dignity, humanity and impartiality characteristic of American Courts.

It seems that the Circuit Court's holding makes for a looseness and inaccuracy in criminal prosecutions that would weaken the safeguards the law affords an accused, guilty and innocent alike. Judicial sanction to such a proposition would not be confined to the case at bar, as "the tendency of a principle to expand itself to the limit of its logic" (Cardozo, J., Nature of the Judicial Process, p. 51) is generally acknowledged.

POINT B

The erroneous instruction in effect amended the indictment so as to include another crime in violation of the Fifth Amendment to the United States Constitution.

In effect, the Court's charge amended the indictment by adding another crime, to wit, that petitioner was accused also of cheating and swindling or defrauding the Government of the United States or a department thereof of money or property. There is no such charge in the indictment found by the Grand Jury nor is there any claim or proof anywhere here of pecuniary or property loss.

Such an amendment amounts to a reindictment without a Grand Jury which is prohibited by the Fifth Amendment of the United States Constitution.

In *United States* v. *Faucett*, 3rd Cir., 115 F. (2d) 764 (1940), the Court stated (p. 766):

> "At common law it was beyond question that in the English Courts the body of an indictment could not be amended. The reasoning behind this rule was that the finding of a grand jury was upon oath and, depending upon this fact amongst others for its validity, could not be amended by the court or presiding officer *in any manner* of substance, without the concurrence of the grand jury which presented it. *Rex* v. *Wilkes*, 4 Burrow 2527, Hawkins Pleas to the Crown, Bk. 2, C. 25, Sec. 97. This doctrine has been followed in the Federal courts and whenever an amendment of substance has been made in the body of an indictment, the courts have been quick to hold it violative of the Fifth Amendment of the Constitution providing that 'no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury'. *Ex Parte Bain*, 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849; *Dodge* v. *United States*, 2 Cir., 258 F. 300; *Stewart* v. *United States*, 9 Cir., 12 F. 2d 524.

> This is true even if the defendant agrees that the facts stipulated should have the same effect as if set forth in the indictment, *United States* v. *Norris*, 281 U. S. 619, 50 S. Ct. 424, 74 L. Ed. 1076." (Italics ours.)

Ex Parte Bain, supra, is the authoritative case in this country that an amendment in any manner of the substance of an indictment without a resubmission of the case to the Grand Jury ousts the court of jurisdiction, and a defendant would be entitled to his discharge by writ of habeas corpus.

At page 767 of the *Fawcett* case the Court further said:

> "The test as to whether the defendant is prejudiced by an amendment to an indictment has been said to be whether an indictment as it originally stood would be equally available after the amendment is made, and whether any evidence the defendant might have would be equally applicable to the indictment in the one form as in the other"; citing *State* v. *Moyer*, 76 Or. 396, 149 P. 84.

Applying the tests to this cause, (a) it is too apparent for argument that the act charged against the petitioner in the indictment, to wit, willful concealment of a material fact not involving pecuniary or property loss to the Government was not a crime under the statute read to the jury as "the nature of the case", and, therefore, the charge against the petitioner was not indictable thereunder; (b) nor was the evidence of the respondent or petitioner applicable to an indictment charging that the petitioner fraudulently caused pecuniary or property loss to the Government.

It is impossible to determine under the general verdict that the jury did not convict under the repealed statute with no evidence in the record to support such conviction (*Cramer* v. *U. S.*, decided by this Court April 23, 1945, 13 L. W. 4347; ..... S. Ct. .....).

POINT C

I. Guilty intent may not be inferred from the mere possession of lawful material, and the Circuit Court fell into error in not so holding.

II. It is error to hold that a mass of prejudicial evidence was properly received on a matter not an issue in the case.

III. Reversible error is practically admitted by respondent when it conceded in the lower Court that Exhibits 2-2a and 31 through 35 were of no significance, yet the Circuit Court ignored the concession and their prejudicial effect by omitting any reference to it in the decision. It also erred when it held that the record does not support the claim that this evidence was taken from petitioner's home without consent or proper warrant.

As to I hereof

The following numbered exhibits were all marked for identification during the examination of the witness Riddle, at the folio of the record indicated, and were received in evidence at folio 248 of the record. Exhibits marked "A" are English translations of German originals. They are briefly described.

Exhibit	*Folio*	*Description*
1–1A	40	Magazine, Die Deutsche Werbung. The p lication for Economic Advertising and Advertising World.
2–2A	46, 203	Passport and translation of page 8. " ported New York, N. Y. Sept. 6, 1939, Ger Consulate General."
3, 4	48	Pins and emblems.
5–5A	56–57	Book, Deutschland Zwischen Nacht Und (Germany Between Day and Night).
6	58	Booklet containing pictures of Hitler.
7	61	German-Japanese dictionary.
8	62	Trade guide issued by Deutscher Kons Verband, Inc. German-American Busi League.

The witness Riddle secured the foregoing exhibits, with the exception of Exhibits 2 and 2A, from a search of petitioner's home. The petitioner gave this witness his consent to search his home (fol. 29).

The exhibits were not relevant or material to the charge made against the petitioner, and the effect of these exhibits, singly and collectively, was prejudicial to the defense.

Piling up in evidence publications in German containing pictures of Hitler and swastikas, and a Japanese-German dictionary, along with pins and emblems of German origin, was dramatic and impressive and could only succeed in causing prejudice against the petitioner.

The possession of these exhibits did not tend to establish that the petitioner was a member of the Nazi Party, for such literature, insignia, etc., may be found in the possession of non-Germans, United States citizens, anti-Nazis, libraries, colleges and elsewhere. They were irrelevant, for they did not tend to prove the fact in issue, viz., membership. Nor were the exhibits material, for they did not tend to establish the controversial fact of membership or affiliation.

There is not, nor can there be, a presumption that from the possession of lawful material the jury may infer evidence of guilt. The exhibits had no practical value in determining the fact of membership or affiliation. No proof of their use was offered during the indictment period or at any time, except mere innocent possession.

It does not appear that the books and papers taken from petitioner's library were representative of that library. In fact, the contrary appears, for there is testimony that petitioner had a large library. The books and periodicals might be found in any representative library. In the absence of proof of illegal activity on the part of the petitioner, the possession by him of these books, etc., has no more significance than their possession by anyone else.

The Circuit Court held that there was no error in admitting these exhibits, as they went to establish the background from which the petitioner's knowledge and wilfulness might better be judged.

This holding appears to be untenable for the reason, in addition to those above given, that it can even be argued with persuasiveness that the fact that the petitioner had these things so casually and openly was probative of his honesty and lack of intent to conceal or deceive.

The real purpose in getting these exhibits (pins, books, magazines) to the jury was for them to see pictures of Hitler, swastikas, etc., the respondent knowing that such matter would tend to build up a personal hostility in their minds against the petitioner and seal his doom.

As to II hereof

Due objection and exception was taken by the petitioner to the admission of the following exhibits (fols. 246-247) which were marked for identification during the testimony of the witness Illian, at the folio of the record indicated, and although not formally in evidence, testimony was taken concerning them. They were received in evidence at folio

248. Exhibits marked "A" are English translations of German originals.

Exhibit	*Folio*	*Description*
10–10A	89	Blank application for admittance into N Party.
11–11A	89	Blank questionnaire used as part of appli tion.
12–12-A	89	Blank form. Part of application—that ap cant not a member of German-Ameri Bund.
13–13A	89	Blank form. Statement certifies applic does not belong to Rotary Club.
14–14A	89	Blank form questionnaire. Part of appli tion.
15–15A, 15–B	97	Ausland Ausweis and card, foreign ident cation folder, listing ten rules of condu Do not contain petitioner's name, but ha another's picture and card.
16–16A	104	Pink membership card. Does not conta petitioner's name. Card of one Carl Aign not connected with case in anywise.
17–17A	104	Green membership card. Does not conta petitioner's name. Card of one Augu Richert, not connected with case in anywi
18–18A	108	Red membership book of one Ernest Barn not in anywise connected with case. Do not contain petitioner's name.
19–19A through 23–23A	113	Dues receipts, some without names, som with names. Petitioner's name nowhere ap pears.
26–26A	143	Fifteen (15) letters or invitations to festiv ties sponsored by German Consulate.
27–27A	170	Instruction slip.

At folio 140 the following colloquy took place with respect to the exhibits:

> "Mr. Levinson: I hope your Honor is taking all this testimony subject to connection?
> The Court: Oh, yes, thus far the witness has been identifying or describing those exhibits marked for identification so that the record will be conformitive (sic)."

At folios 177-178 the following colloquy took place between the Court and trial counsel for petitioner:

> "Mr. Levinson: Your Honor, the defendant respectfully moves to strike out all the testimony of this witness on the ground that the Government has failed to connect this defendant in any manner whatever as charged in the indictment, with the commission of this crime as charged. There is no testimony here by this witness which connects this defendant, and therefore it is incompetent, irrelevant and immaterial.
> The Court: You may be right and perhaps your motion would be proper when the Government rests. I will not grant your motion at this time, but I reserve to you the right to renew it."

It was error not to grant the motion then or later for there is not a scintilla of evidence to connect the petitioner with these exhibits.

The inadmissibility of these exhibits was acknowledged in effect by the Court, when it charged (fol. 427):

> "Those papers I have referred to, Exhibits 10 to 23, * * * I think if I were you, I would not look at those papers. I do not think they will assist you in the performance of your task. You have the right, however, to look at them."

However, the exhibits were in evidence, and this charge could not eradicate their damaging effect. Furthermore, any tendency that the above-quoted charge might have to lessen such damage was eradicated by the following statement by the Court, when it charged at folio 427:

> "* * * You have the right, however, to look at them. You have the right, having examined Exhibits 24 and 25, to look at the material used in the compilation of Exhibits 24 and 25, if you accept the testimony of the witness, Illian, on that subject."

This charge could only confuse a jury to the petitioner's prejudice and the cumulative effect of the introduction of all these non-relevant exhibits prejudiced the petitioner seriously.

As the testimony of the witness Illian is read, the impression continues to grow that the exhibits, as they are identified by the witness and testimony given concerning them, to wit, the applications, questionnaires, membership cards, membership book, dues, receipts, letters and invitations, relate to the petitioner, that they contain the name of petitioner, his signature, etc. But they do not contain the petitioner's name, signature, etc. They have no relation to the petitioner and it is apparent that these non-material and irrelevant documents in the circumstances could only prejudice the defense unduly. All that the foregoing exhibits might tend to prove is the existence of an organization, namely, that of the Nazi Party, which was not an issue in the case. But the apparent motive for getting the exhibits in evidence was to place before the jury matter of a highly prejudicial nature, having no conceivable relation to the petitioner.

Yet the Circuit Court held that these exhibits were properly admitted, "In order to prove that defendant (petitioner) was a member of the Nazi Party in the United States, the prosecution clearly had to establish the background of its existence and mode of operation as a political organization in this country."

This holding by the Circuit Court is a rationalization of the motive for the introduction of this cumulative mass of exhibits.

The existence of a Nazi party organization in this country was not an issue in the case. At least, it was not a

contested issue. *Arguendo,* if it were necessary for the Government to prove that the Nazi party existed here, it was not at all necessary to do so by exhibits of this character. In fact there was no need for the introduction of a single one of these exhibits, for the existence of a Nazi party organization was fully established by the direct testimony of the witness Lilly Illian (fols. 84, 85, 86, 87, 88, 89, etc.).

The real motive in placing before the jury these exhibits (membership cards, application forms, instructions, etc.) was to anger the jury against the petitioner, because they contained highly prejudicial matter such as, that applicant does not belong to Rotary Club (Exhibit 13), or that applicant is free of Jewish or colored racial strains (Exhibit 10) or the rules of conduct of a Nazi party member (Exhibit 15) or statements over the signature of Adolf Hitler (Exhibit 18) or matter concluding with "Heil Hitler" (Exhibit 26), etc.

As to III hereof

These exhibits are:

hibit	*Folio*	*Description*
2	46	Passport book. Translation of page 8. "Reported, New York, N. Y. Sept. 6, 1939. German Consulate General."
A	203	
31A	197	Certificate of Ownership No. 086851. Certifies petitioner awarded German Field Medal of Honor for service at front during First World War.
32A	197	Papers issued by Military Registration Office, Bremen, that petitioner was found fit for limited service. Military service status is given as "Second Reserves".
33A	197	Booklet, England and the Boers.
34A	197	Booklet, England—Despotism in Ireland.
35A	197	Newspaper, Illustrierter Beobachter—Illustrated Observer, Special Edition, March 16, 17, 1935.

The Circuit Court states that the record does not support the claim that this evidence was taken from petitioner's home without consent or proper warrant.

The testimony on this score is (fol. 404):

> "Q. Did he ask you (petitioner's wife) for permission to search your home? A. He did.
>
> Q. And did you give him that permission? A. No.
>
> Q. Did he tell you that he had an executive search warrant and that in case you refused permission he would be required to search anyway? A. Yes.
>
> Q. Did you continue to refuse to permit him to search your home? A. Yes, I did, because I resented it."

The warrant was not produced or shown.

Without warrant, in petitioner's absence and without petitioner's consent, and over protest and objection of petitioner's wife these exhibits were seized.

A search made without warrant, and not as an incident to a lawful arrest, is unlawful (*Agnello* v. *U. S.*, 269 U. S. 20), and under the Fourth Amendment of the United States Constitution these papers should not have been received in evidence (*Goldstein* v. *U. S.*, 316 U. S. 114).

The Circuit Court said the use of the warrant (not produced) was justifiable to search for property unlawfully held by an alien enemy.

But, the possession of the exhibits by petitioner was not unlawful or forbidden. They were not illegal before this country entered the present war, and their possession was not declared illegal after we entered the war.

The exhibits discussed here were not stolen or forfeited property, smuggled goods, implements of crime and the like. There is a distinction *toto coelo* between contraband articles, on the one hand, and a man's private papers on the other, seized for the purpose of obtaining information therein contained, or of using them as evidence against him. In the former case, the Government is entitled to possession of the property, in the latter it is not (*Boyd* v. *United States*, 116 U. S. 616).

In the lower Court the respondent conceded that these exhibits were of no significance. Why were they then put into evidence? Why were they not withdrawn from the case before its submission to the jury and who can say what effect these exhibits had on the jury? As reversible error is practically conceded, it should not have been ignored by the Circuit Court of Appeals.

POINT D

The Circuit Court erred in upholding the conviction although it was based upon an identification resting wholly upon concurrence of names which under general criminal law is wholly inadequate for purposes of identification.

The Circuit Court held that, "At the trial the prosecution introduced evidence that defendant's name appeared on a so-called list 'of those who have applied for Passports,' which, according to Illian, a stenographer at the German Consulate in New York in charge of collecting dues for the local branch of the Nazi Party, was in reality a list of the members of that organization, prepared from files and folders shortly before these disappeared from Party Headquarters in May, 1940. Defendant's name also appeared on a partially burnt list of members in arrears in payment of dues, with definite indications that his delinquency had been removed and his arrears paid in February, 1940."

These holdings are grounded on assumptions having no support from the record. The exhibits referred to by the lower Court are 24 and 25. But where is there proof of the connection between the name on Exhibits 24 and 25 and petitioner? Unequivocally, we state there is none.

In this connection it was strange indeed that the Government's star witness Illian, who worked for over two years in the German Consul's office collecting dues from Nazi

party members, keeping records, etc., failed to testify that she knew petitioner, ever saw him, corresponded with him or collected dues from him. It is apparent that the witness Illian did not so testify because she neither knew, nor saw, nor corresponded with petitioner, or ever collected dues from him.

Identity of name is not sufficient in a criminal prosecution to show identity of person (*People* v. *Reese*, 258 N. Y. 89, 96; *People* v. *Rubin*, 286 N. Y. 56, 59; *Ayers* v. *Ratshefsky*, 213 Mass. 589, 101 N. E. 78, 80, and the authorities there cited).

In *People* v. *Rubin*, the Court of Appeals of the State of New York (op. Loughran, J.) held that it was error for the Court to receive in evidence a writing or record bearing the name and business address of the defendant with figures alongside, which a clerk was permitted to testify indicated that at the times represented by the figures fourteen letters were sent to the witness by the defendant. There was no testimony as to how the name and address of the defendant came to be entered upon the record. It was no evidence against the defendant except upon the assumption that in the absence of inherent improbability or credible proof to a contrary effect, the appearance of the same name at all times designates a given person. The jury should not have been permitted to hypothesize for the purpose of the defendant's conviction of the crime charged and it cannot be assumed that the error was a technical one not affecting the substantial rights of the defendant. The Court cited, 2 Chamberlayne on The Law of Evidence, Sec. 1187; 15 Am. & Eng. Encyc. of Law (2d Ed.), pp. 918-924; 9 Wigmore on Evidence (3d Ed.) 2529; *People* v. *Reese, supra, People* v. *Sellinger*, 265 N. Y. 149.

As in the *Rubin* case, there is none of the required connecting proof to render Exhibits 24 and 25 admissible in evidence, and their retention in evidence was reversible error.

CONCLUSION

It is, therefore, respectfully submitted that this Court should grant a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, as prayed for in the petition.

Dated: May 28, 1945.

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